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NO. 83-5500

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NATHAN SOLOMON,

Petitioner,

-against-

DAVID HARRIS, Warden of Green Haven
Correctional Facility,

Respondent.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent submits this brief in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit filed by petitioner's appointed counsel. Respondent respectfully requests that the court deny the petition for a writ of certiorari.

QUESTIONS PRESENTED

1. Whether a case in which both a New York State court and the federal district court found that petitioner was afforded the effective assistance of counsel under the 6th and 14th Amendments using the more exacting "meaningful representation" and "reasonable competence" standards, presents the appropriate vehicle for issuing a writ of certiorari to review the constitutional propriety of the Second Circuit's "farce and mockery" standard for examining the effective assistance of defense counsel in a state criminal trial?

2. Whether a writ of certiorari should issue to review the Second Circuits "farce and mockery" standard where, given the facts of the instant case, petitioner received the effective assistance of counsel under any of the prevailing standards adopted by the Circuit Courts.

THE PARTIES

All parties are named in the caption of the petition.

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STATEMENT OF THE CASE

The Trial

Petitioner and co-defendant Joseph Miller were indicted for Murder in the Second Degree (New York Penal Law § 125.25) and a related weapons charge arising out of the shooting death of Norman Duncan on June 18, 1974.

Petitioner's co-defendant, Joseph Miller, earned his living as an illicit drug dealer in The Bronx, New York. Amongst his employees were petitioner, who worked as Miller's "body guard", Donald Isom and Norman Duncan, who acted as "look-outs", and George McFadden, who was involved in the sale of the narcotics. Some time approximately four to five months before the murder, Donald Isom and Norman Duncan toyed with the idea of "ripping off" Miller. While they had talked about the possibilities, their idea did not ripen into a full-fledged plan until one week before the murder, when Miller began paying Duncan and Isom less money.

At approximately 6:00 p.m. in the late afternoon of June 18, 1974, co-defendant Joseph Miller was standing with a group of people on Hoe Avenue in the vicinity of 173rd Street in Bronx County. Petitioner rode up to the block on a bike and Miller separated himself from the crowd, approached petitioner, and handed him a gun. Petitioner placed the gun in his pants and sat down in a beach chair on Hoe Avenue. Soon after, Duncan and Isom arrived on Hoe Avenue and walked past petitioner, who was still seated in the beach chair on the east side of the block. About 50 feet up the street from petitioner, Duncan and Isom encountered George McFadden, who was sitting on the stoop of a building. Duncan placed his arm around McFadden's neck, and a "minor scuffle" ensued.

Within seconds, petitioner dropped down on one knee and began firing at Duncan at a point blank range of about 50 feet. Isom ran towards 172nd Street, and Duncan ran in the opposite direction. Petitioner, now standing, crossed the street and continued to fire at Duncan from a position in front and to the left of Duncan.

During the shooting, co-defendant Miller urged petitioner to keep shooting. Soon, co-defendant Miller shouted to petitioner, "Let's get the hell out of here." Gun in hand, petitioner fled the scene with co-defendant Miller.

About one week later, co-defendant Miller told Isom that his (Miller's) man, Solomon, could have killed him, too, and that Isom should take care of his brother.

Vincent Garrett, a private investigator, testified in petitioner's behalf at trial. He referred to a transcript of an alleged telephone conversation with Donald Isom, whom he had never seen or spoken to in person. On direct examination Garrett asserted that Isom said that he did not know who shot Duncan but was told it was Solomon, and that he did not see Miller the day of the murder. On cross-examination, the witness admitted that Isom did, in fact, identify "Nate" (Solomon) as the man who shot Duncan.

The jury found both petitioner and co-defendant Joseph Miller guilty of Murder in the Second Degree. Petitioner was sentenced to 25 years to life imprisonment.

The State Court Appeals

Petitioner appealed his conviction to the Appellate Division of the State of New York, First Department, alleging, inter alia, that his Sixth Amendment right to confront his accusors was violated by the admission of co-defendant Miller's extra-judicial statement and that his guilt was not proven beyond a reasonable doubt at trial. The People responded by arguing that petitioner had failed to properly preserve a question of law concerning his co-defendant's statement by his failure to make a contemporaneous objection to the statement at trial, and that this claim, as well as the others raised, were, in any event, without merit. The Appellate Division, First Department, unanimously affirmed petitioner's conviction, without opinion. People v. Solomon, 60 A.D.2d 798 (1st Dept. 1977). Leave to appeal to the New York Court of Appeals was denied by then Associate Judge (now Chief Judge) Lawrence H. Cooke. People v. Solomon, 43 N.Y.2d 932 (1978).

The Collateral State Proceedings

On April 18, 1979, petitioner filed a post-conviction motion to vacate his conviction motion in Supreme Court, Bronx County pursuant to New York Criminal Procedure Law § 440.10. Petitioner attacked his conviction on the ground that he was denied the effective assistance of counsel at trial. Specifically, petitioner alleged that his attorney (1) failed to investigate his case, (2) failed to file any motions on his behalf, (3) failed to object to hearsay evidence introduced at trial, (4) failed to move for a severance, and (5) failed to object to the court's allegedly erroneous charge to the jury.

On May 15, 1979, Justice Donald Zimmerman, who presided at petitioner's trial, denied his motion on the merits. Permission to appeal to the Appellate Division, First Department, was denied on August 16, 1979, by Associate Judge David Ross.

The Federal Court Proceedings

On July 29, 1980, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York claiming that: 1) the admission of his co-defendant's statement violated his Sixth and Fourteenth Amendment rights, 2) his guilt was not proven beyond a reasonable doubt, 3) the court's charge to the jury was erroneous, 4) the court erroneously admitted evidence of petitioner's drug-related activity, 5) his sentence was excessive, and 6) he was denied the effective assistance of counsel at trial. Petitioner had raised his first five claims in his brief to the Appellate Division and the sixth in his 440.10 motion.

On May 6, 1981, Judge Charles L. Brieant denied the writ in all respects. Judge Brieant found that, except for his inadequacy of counsel claim, petitioner had exhausted his state court remedies with respect to the issues raised in his petition, but that his claims were without merit.

On June 19, 1981, pursuant to a motion filed by petitioner, Judge Brieant issued a Corrective Memorandum and Order finding that petitioner had, in fact, exhausted his ineffective assistance of counsel claim in state court.

Judge Brieant then reviewed petitioner's claim and denied his claims of error on the merits.(See Respondent's Appendix 1).

On June 2, 1981, Judge Brieant denied petitioner a Certificate of Probable Cause to appeal to the Second Circuit. A Certificate was subsequently granted by that Court.

On December 1, 1982, in accordance with Rock V. Coombe, 694 F.2d 908 (2d Cir. 1982) cert. denied, 103 S. Ct. 1773 (1983), petitioner abandoned his claims of erroneous jury instructions, improperly admitted evidence, and the alleged excessiveness of sentence on his appeal before the Second Circuit.

In appealing the denial of his petition for a writ of habeas corpus to the United States Court of Appeals for the Second Circuit, petitioner again claimed that 1) he was denied the effective assistance of counsel at trial, 2) that his guilt had not been proven beyond a reasonable doubt, and 3) that a statement of his co-defendant admitted at trial violated the rule of Bruton v. United States, 391 U.S. 123 (1968).

In affirming the judgment of the District Court, the Second Circuit found that petitioner was not denied his Sixth and Fourteenth Amendment rights to the effective assistance of counsel. Specifically, the court found that some investigative work was done by a court-appointed private investigator and that petitioner's claim that further investigation would have benefited him was entirely speculative. Furthermore, the court found that trial counsel's failure to object to a hearsay statement of co-defendant Miller admitted at trial as a violation of the rule of Bruton v. United States, 391 U.S. 123 (1968), was a reasonable tactical judgment (see Petitioner's Appendix A, pp. 4-6).

REASONS FOR DENYING THE WRIT

POINT

A WRIT OF CERTIORARI SHOULD NOT ISSUE TO REVIEW THE CONSTITUTIONAL PROPRIETY OF THE SECOND CIRCUIT'S "FARCE AND MOCKERY" STANDARD IN EXAMINING THE EFFECTIVE ASSISTANCE OF DEFENSE COUNSEL IN A STATE CRIMINAL TRIAL UNDER THE 6TH AND 14TH AMENDMENTS IN THE INSTANT CASE SINCE BOTH A NEW YORK STATE COURT AND THE FEDERAL DISTRICT COURT FOUND THAT PETITIONER WAS AFFORDED THE EFFECTIVE ASSISTANCE OF COUNSEL USING HIGHER STANDARDS AND WHERE, GIVEN THE FACTS OF THE INSTANT CASE, PETITIONER RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER ANY OF THE PREVAILING STANDARDS ADOPTED BY THE CIRCUIT COURTS.

Petitioner claims that his petition for a writ of certiorari should be granted in order to raise before this Court the issue of "whether the appropriate standard under the Sixth Amendment for judging the adequacy of an accused's trial counsel's representation should be the 'farce and mockery' standard of the Second Circuit or the reasonable competence standards adopted by all the other Federal Circuit Courts of Appeals." (Petition p. 7). Petitioner's claim should not be entertained and his petition should be denied since it is clear that, in the instant case, petitioner received the effective assistance of counsel at trial under any of the prevailing standards in the Federal Circuit Courts and thus, this is not an appropriate case for this Court's review of this issue.

Indeed, in reviewing petitioner's claim, both the New York court that decided petitioner's post-conviction motion pursuant to New York Criminal Procedure Law § 440.10 and the District Court for the Southern District of New York applied more exacting standards than the Second Circuit's "farce and mockery" standard and found petitioner's counsel's representation not to

be lacking.*

Furthermore, a review of trial counsel's representation in the instant case reveals that this petition does not present a factual basis on which petitioner's claim should be entertained. Petitioner devotes much of his argument to his complaint that trial counsel did not visit him at his place of incarceration, and failed to adequately investigate and prepare his case. In support of his contention, petitioner cites the vouchers counsel submitted for reimbursement, relating to petitioner's case. Surely, this Court must recognize that these vouchers do not impart the complete picture. To begin with, they do not relate the discussions and conferences petitioner undoubtedly had with counsel on the many adjournment dates he was produced in court, under conditions far better than those that would have been afforded at Riker's Island, the New York City jail in which petitioner was confined pending trial. Secondly, they do not contain preparatory work done by counsel for which he did not submit a claim and thirdly, they do not contain the preparation and investigation conducted by counsel for co-defendant Miller which was undoubtedly used to their mutual benefit before and during trial. Indicative of the probability that petitioner and trial counsel did have numerous discussions concerning the case is the fact that petitioner at no time expressed dissatisfaction with counsel at trial. Furthermore, infrequency of visitation and allegations of insufficient time consumed in oral discussion and legal research are not the crucial tests of the effectiveness of counsel. Brinkley v. LeFevre, 621 F.2d 45, 46 (2d Cir. 1980); United States v. Wight, 176 F.2d 376 (2d Cir. 1949) cert. denied, 338 U.S. 950 (1950. Such proof of inadequacy lies in the "character of the resultant proceedings" Wight, supra at 379.

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* New York State follows a more exacting "meaningful representation" standard in testing the effectiveness of counsel. People v. Baldi, 54 N.Y.2d 137 (1981); People v. Bell, 48 N.Y.2d 933 (1979); People v. Aiken, 45 N.Y.2d 394 (1978).

The District Court, in its corrective order, specifically found that petitioner's trial counsel "participated actively and diligently in the trial" and provided effective assistance "even under the standard of 'reasonable assistance or reasonable competence' ". (See Respondent's Appendix 1, p. 4).

Petitioner's additional claims are weaker still. Petitioner's Bruton claim was so tenuous that trial counsel's lack of objection was most probably the best tack to take in order to insure that the statement was not given undue significance. In the statement at issue, co-defendant Miller merely claimed that petitioner was "his man." In fact, Miller's declaration was admitted in order to tie Miller to the crime under the acting-in-concert theory. The direct evidence clearly established that Solomon murdered Duncan. Direct evidence and uncontradicted circumstantial proof also demonstrated that Solomon was Miller's bodyguard. Thus, Miller's recognition of his own complicity added nothing vis-a-vis Solomon. At best it was cumulative evidence on the issue of the identity of the man who took part in the shooting. Furthermore, petitioner's claim that counsel should have moved for a severance because of the probable admission of this statement at trial fails for the same reason - the insignificance of the statement - and for the additional reason that in light of the overwhelming independent proof of his guilt, a severance would have had virtually no impact on petitioner's case and thus, would have been far outweighed by the state's interest in judicial economy.

Finally, the bulk of petitioner's other complaints refer to counsel's lack of objection to evidence admitted at trial. It should suffice to note that the propriety of admitting this evidence was raised by petitioner in the Appellate Division of the State of New York, First Department. That court could have reversed his conviction, despite his lack of objection, in the interest of justice, had such egregious errors been committed that petitioner was unduly prejudiced at trial. Instead, the state court found that petitioner was not denied a fair trial. This Court should agree.

Nor can there be any question that defense counsel below prepared a well thought out, complete and effective defense. A defense witness was presented, and defense counsel vigorously cross-examined all of the People's witnesses as well as co-defendant's witnesses. Moreover, defense counsel interposed objections at appropriate times, moved for a trial order of dismissal and prepared a forceful summation. Furthermore, any legitimate avenues of attack not touched upon by petitioner's counsel were certainly

covered by co-counsel, whose presentation this Court can consider in determining the adequacy of petitioner's representation. United States v. Williams, 575 F.2d 388, 393 (2d Cir.) cert. denied, 439 U.S. 842 (1978). Consequently, it is clear that whether judged by the standards of the Second Circuit or by some higher standard, petitioner was afforded the effective assistance of counsel, and thus that this record is an inappropriate vehicle for considering the issue petitioner wishes to present.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED IN ALL RESPECTS.

Respectfully submitted,

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OCTOBER, 1983

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APPENDIX

ORIGINAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

NATHAN SOLOMON, :

Petitioner, :

-against- :

DAVID HARRIS, Warden of Green Haven Correctional Facility and ROBERT ABRAMS, Attorney General of the State of New York, :

Respondents. :

- -X

Pro Se 80 Civ. 4321-CLB

MEMORANDUM AND ORDER

Brieant, J.

On May 6, 1981 this Court issued a Memorandum and Order denying the application of petitioner Nathan Solomon for a writ of habeas corpus. On June 10, 1981 petitioner filed a motion for relief from this Order, pursuant to Rules 60(b)(1)(6) and 61, F.R.Civ.P., and the Rules Governing Section 2254 Cases in the United States District Courts.

Petitioner asserts the following grounds for his motion: (1) petitioner's copy of the Memorandum and Order of May 6, 1981 was not signed, but rubber-stamped; (2) the Court mistakenly held that petitioner had failed to exhaust his state remedies as to his claim based on ineffectiveness of counsel, and therefore failed to reach the merits of this claim; (3) omissions, mistakes and errors by the Court have deprived the petitioner of Constitutional and statutory rights; and (4) a prompt hearing on petitioner's Sixth Amendment claim is required.

MICROFILM
JUN 23 1981

Upon reading petitioner's motion herein, his petition for a writ of habeas corpus, and the affidavit in opposition to the petition, the Court concludes that the petitioner did in fact exhaust his state remedies as to his claim for ineffective assistance of counsel, as required by 28 U.S.C. § 2254(b), prior to filing his petition for a writ of habeas corpus on July 29, 1980. Apparently, petitioner filed a motion in state court, pursuant to § 440.10, New York Criminal Procedure Law, in which he raised the ground of ineffective assistance of counsel; his motion was denied in May 1979 by the Supreme Court, Bronx County, and leave to appeal to the Appellate Division, First Department was denied on August 16, 1979.

Accordingly, petitioner's motion for relief from this Court's May 6, 1981 Order is granted, pursuant to Rule 60(b)(1), on the ground of mistake, for the limited purpose of allowing this Court to rule on petitioner's claim that he received ineffective assistance of counsel during his trial in state court.

The Court declines to order an evidentiary hearing as to this claim; the Court has read the record of petitioner's trial in state court, which documents the conduct of petitioner's counsel during trial.

Petitioner asserts that his trial counsel was ineffective for the following reasons: (1) trial counsel failed to make an adequate investigation of the facts and the law; (2) trial counsel failed to file necessary motions and applications; (3) trial counsel failed to object to hearsay evidence; (4) trial counsel failed to make a motion that petitioner's trial be severed from that of his co-defendant; (5) trial counsel failed to make a motion to suppress

the testimony of Mr. Harold Simpson; and (4) trial counsel failed to object to the trial judge's charge of the jury.

In this Circuit, the standard for judging assistance of counsel is still that set out in United States v. Wight, 176 F.2d 376, 379 (1949), cert. denied 338 U.S. 950 (1950):

> "Unless the purported representation of counsel was such as to make the trial a farce and a mockery of justice, mere allegations of incompetency or inefficiency of counsel will not ordinarily suffice as grounds for the issuance of a writ of habeas corpus ....
>
> A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice."

See, United States v. Aulet, 618 F.2d 182, 187 (2d Cir. 1980); Indiviglio v. United States, 612 F.2d 624, 629, n. 8 (2d Cir. 1979), cert. denied, 445 U.S. 933 (1980); United States v. Bubar, 567 F.2d 192, 202 (2d Cir.), cert. denied, 434 U.S. 872 (1977).

The Court of Appeals has also declined recently to reconsider the Wight standard in light of the standards followed in other Circuits of "reasonable assistance" or "reasonable competence," because the Court was not presented with a proper case in which to so reconsider. See, 618 F.2d at 187; 612 F.2d at 629, n. 8; Rickenbacher v. Warden, Auburn Correctional Facility, 550 F.2d 62, 66 (2d Cir. 1976), cert. denied, 434 U.S. 826 (1977). This is certainly not such a case.

In evaluating a claim of ineffective assistance of counsel, a Court

must begin by examining the strength of the prosecution's case. 618 F.2d at 188; 612 F.2d at 629, n. 9. As this Court noted in its Order of May 6, 1981:

> "We feel constrained to observe that this case arose out of a slaying by gunfire of one member of a drug conspiracy by another on a city street in broad daylight in the presence of at least three eye-witnesses. Clarence Darrow reincarnate could not have exonerated this petitioner of his overwhelming guilt."

The Court also finds that the trial counsel participated actively and diligently in the trial, although he apparently did not object as frequently as petitioner would have wished. Accordingly, the Court holds that the petitioner's trial counsel provided effective assistance under the Wight standard, and even under the standard of "reasonable assistance or reasonable competence," not applicable here.

The Court denies petitioner's motion for relief from judgment on the other grounds asserted. The original Memorandum and Order of May 6, 1981, which has been docketed and filed in this Court, was manually signed by me, while all copies were rubber-stamped in accordance with the Court's normal practice. Petitioner's contention that the Court's Order contains omissions, mistakes and errors, other than as to the Sixth Amendment claim, is premised on arguments previously considered and rejected by the Court; the Court declines to reconsider these contentions.

So Ordered.

Dated: New York, New York
June 19, 1981

Charles L. Brieant

Charles L. Brieant
U. S. D. J.